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No. 1324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BRYANT CHUCKING GRINDER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR BRYANT CHUCKING GRINDER COMPANY IN REPLY TO THE BOARD'S BRIEF IN OPPOSITION

KENNETH C. MCGUINESS
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorney for Petitioner,
Bryant Chucking Grinder Company

Of Counsel:

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & MCGUINESS
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

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1. The Board argues in opposition to the first question presented in Bryant's certiorari petition that the validity of the Board's *Cumberland Shoe* rule, 144 NLRB 1268, is not involved in this case because Judge Friendly, one of the two judges below who upheld the Board's bargaining order, tested the validity of the

Union's authorization cards against the standard set forth in the Second Circuit's decision in *N.L.R.B.* v. *S. E. Nichols Co.*, 380 F.2d 438, rather than against the *Cumberland Shoe* standard; and also because under either the *Cumberland Shoe* standard or the *Nichols* standard not enough cards can be invalidated to upset the Union's majority status (Bd. Br. 10-12). The Board's argument is patently inconsistent with its own brief and with the circumstances involved in this case.

First, in its rephrasing of the Questions Presented by Bryant's petition the Board has restated Bryant's initial question as a precise paraphrase of the *Cumberland Shoe* rule (Bd. Br. 2). And, in briefing this issue, the Board states unequivocally that the first question presented by Bryant's petition "involves the validity of the Board's *Cumberland Shoe* rule, 144 NLRB 1268" (Bd. Br. 10). Moreover, it is clear that the validity of the *Cumberland Shoe* rule is squarely involved in this case. For the Board applied the *Cumberland Shoe* rule when it rejected Bryant's contention that most of the Union's cards had been signed by the employees to get an election, and, on this basis, held that the Union was the majority representative (J.A. 726-727, 734, n. 42; Bd. Br. 9, n. 9). And although Judge Hays, the other judge below who upheld the Board's bargaining order, did not advert to the rule by name, he clearly was following the *Cumberland Shoe* standard when he said that "at no time were the employees told that the sole purpose of signing the cards was to secure an election" (Bryant Pet. 35).

Secondly, to say, as does the Board in its opposition to Bryant's petition, that the majority of the Union's

cards cannot be invalidated under either the *Cumberland Shoe* or the *Nichols* standard, is to beg the question. Bryant's petition is not merely seeking reversal of the judgment below on the narrow ground that the *Nichols* standard is the proper standard and should therefore be substituted for the *Cumberland Shoe* standard in judging the validity of the Union's cards. On the contrary, Bryant's petition invites this Court's attention to the diversity of views among the circuits with respect to the *Cumberland Shoe* rule, and asks the court to resolve the question by declaring which is the correct view. As Bryant's petition also shows, circuit court opinion is not confined to a conflict between those Circuits—the District of Columbia Circuit and the First—that have approved the *Cumberland Shoe* rule (Bryant Pet. 18) and those—the Second, Sixth, and Seventh—that have adopted the *Nichols*, or equivalent, standard (Bryant Pet. 18-19, 20-21). For other Circuits—clearly the Fourth and Fifth, and possibly the Eighth—have adopted a third standard which, squarely rejecting the *Cumberland Shoe* rule, treats as material the employees' subjective reasons for signing authorization cards (Bryant Pet. 19).[1] And it is the latter standard which is reflected in Judge Anderson's dissenting opinion in this case, and which Bryant's petition asserts to be the correct standard (Bryant Pet. 21).

In sum, as Bryant's petition states: "The three opinions in this case not only underscore the need for Supreme Court clarification, but reflect in a single

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[1] In an opinion issued after Bryant's petition was filed, the Fifth Circuit reaffirmed its rejection of the *Cumberland Shoe* rule. See *N.L.R.B.* v. *Southland Paint Co., Inc.*, —— F.2d —— (C.A. 5, No. 24275, May 8, 1968).

case the entire spectrum of court opinion concerning the invalidation of authorization cards because of misrepresentations as to their purpose. This case, therefore, is a most appropriate instrument for the expression of the Court's judgment concerning the matter." (Bryant Pet. 22.)

Finally, the Board's position in this case is plainly inconsistent with its position both in *National Labor Relations Board* v. *Crawford Manufacturing Co.* (No. 1050, this Term), *cert. denied*, April 22, 1968, and in the pending *Preston Products Co.* v. *National Labor Relations Board* (No. 1367, this Term). Thus in *Crawford*, the Board, itself petitioning for certiorari, pointed out the conflict among the circuits with respect to the *Cumberland Shoe* rule—the same conflict referred to in Bryant's petition—and stated that it was appropriate for the Court to resolve the issue (Bd. Pet. in No. 1050, p. 14). And in *Preston*, the Board, noting that the question presented "involves the validity of the Board's *Cumberland Shoe* rule," stated its non-opposition to the petition for certiorari filed in that case because "we continue to believe, for the reasons set forth in our petition in No. 1050, that the issue warrants resolution by this Court" (Bd. Memorandum in No. 1367, p. 2). In the circumstances, it would accordingly appear that the Board is now inviting review of its *Cumberland Shoe* rule in a case *(Preston)* where the court below looked favorably on the rule, while at the same time the Board is seeking to preclude review of this case where the court below for the most part treated the rule with disfavor.

2. With respect to the second question presented in Bryant's petition—whether the court below properly

held that Bryant did not have a good faith doubt concerning the Union's majority status because Bryant refused to recognize the Union without a Board election and certification—the Board states that the issue presented is "factual" and turns on whether substantial evidence supports the Board's finding of lack of good faith (Bd. Br. 2, 13). To characterize the issue as one of mere fact, is to misstate the matter. For as Bryant's petition makes clear, what is actually involved is the question whether an employer may refuse to accept an asserted card majority and may insist upon an election, where there is *no affirmative evidence* showing that the employer lacked a good faith doubt of the union's majority status (Bryant Pet. 24).[2] This is, of course, a question not of fact, but of law; and, as is also shown in Bryant's petition, the decision of the court below in this case is not only in conflict with decisions by other courts of appeals, but is also in conflict with the view of the Board itself (Bryant Pet. 24-26).

Nor is the Board correct in asserting that Bryant "apparently does not challenge" Judge Friendly's view of the matter (Bd. Br. 13). Obviously, the conclusion of the majority of the court below reflects

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[2] The factual statement in the Board's brief (Bd. Br. 2-8) is not only inaccurate in several respects, but it is particularly misleading in that it places emphasis on employer conduct which neither the Board nor the court below found to be violative of Section 8(a)(1) of the Act. Rather than belabor the matter, we merely point out that Bryant's Section 8(a)(1) violations, reliance on which Judge Friendly specifically disavowed, are not a basis for the conclusion of the majority of the court below that Bryant did not have a good faith doubt concerning the Union's majority status (Bryant Pet. 23, n. 13).

Judge Friendly's opinion (Bryant Pet. 23, n. 13), and it is the latter opinion which Bryant's second question seeks to have reviewed by this Court.[8]

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[8] To controvert Bryant's position that an employer's mere refusal to recognize a union without an election does not, *ipso facto*, show a lack of good faith doubt, the Board cites as "settled law" *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956) (Bd. Br. 13, n. 16). The Board's reliance on the latter case is misplaced, for the decision therein does not support the proposition for which it is cited.

In *Arkansas Oak Flooring*, the employer *conceded* majority status but denied recognition solely because of the union's noncompliance with the filing and non-Communist provisions then in the Act. Thus the issue before the Court concerned only the effects of a union's noncompliance with the special provisions then in the Act—Section 9(f), (g), and (h). Indeed, the Court specifically stated that it was not considering the question "that would have been presented . . . if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees." 351 U.S. at 68, n. 2. Thus, *Arkansas Oak Flooring* merely holds that the Act does not preclude an employer from voluntarily recognizing a union where the employer is satisfied that the union has majority status—*i.e.*, where there is no question of representation.

Respectfully submitted,

KENNETH C. MCGUINESS
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorney for Petitioner,
Bryant Chucking Grinder Company

Of Counsel:

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & MCGUINESS
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dated: May 29, 1968.